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No. 89-5867

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SHIRLEY W. IRWIN, PETITIONER

v.

VETERANS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the time limit of 42 U.S.C. 2000e-16(c), which requires a government employee to file a Title VII employment discrimination suit in federal court within thirty days of receipt of notice of final administrative action on his complaint, is jurisdictional.

2. Whether receipt by petitioner's attorney's office of notice of final administrative action triggers the thirty-day period for filing a Title VII complaint against the federal government within the meaning of 42 U.S.C. 2000e-16(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-16) is reported at 874 F.2d 1092. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1989. A petition for rehearing was denied on July 13, 1989. The petition for a writ of certiorari was filed on October 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was dismissed by the Veterans Administration Medical Center in Waco, Texas, on April 17, 1986. On June 12, 1986, he contacted an Equal Employment Opportunity Counselor, alleging that the dismissal was based on discrimination on the basis of his age and handicap, as well as in retaliation for his previous efforts to obtain redress for past acts of discrimination by the agency. Pet. App. 11-12; Pet. 2.

Petitioner eventually filed a formal complaint with the Veterans Administration, but that complaint was rejected on the ground that he had failed to contact the EEO Counselor within thirty days of the alleged discrimination, as required by agency regulations (29 C.F.R. 1613.214(a)(1)(i)). Petitioner appealed

to the Equal Employment Opportunity Commission, which affirmed the VA's decision on March 19, 1987. Pet App. 11-12; Pet. 3.

Notice of the EEOC decision was delivered to the office of petitioner's attorney, and an employee of the attorney signed a receipt for the letter on March 23, 1987. At the time, the attorney was in Korea with his United States Army Reserve unit; he asserts that he first learned of the decision on April 10, 1987. Pet. App. 12.[1/] Petitioner filed suit in district court on May 6, 1987, which the district court dismissed.

2. The court of appeals affirmed. In Ringgold v. National Maintenance Corp., 796 F.2d 769, 770 (5th Cir. 1986), the court of appeals previously had held that, for purposes of Title VII actions against private employers, "the 90-period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant," even if counsel himself did not actually receive notice until later. In the instant case, the court of appeals followed Ringgold and held that petitioner received constructive notice of the EEOC final decision on March 23, 1987, when the decision was received at his lawyer's office. Accordingly, because the complaint was not filed within thirty days of that date, as required by 42 U.S.C. 2000e-16(c), the court determined that the district court lacked jurisdiction over petitioner's Title VII claim. Pet. App. 12-15.[2/]

ARGUMENT

1. The United States, as sovereign, is immune from suit save as it consents to be sued. Title VII remedies against the government, which constitute such consent, thus necessarily

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1/ Petitioner asserted by affidavit that his "best information" is that he himself received actual notice of the EEOC decision on April 7, 1987 (Pet. 3).

2/ The court of appeals observed (Pet. App. 13) that "while the ninety-day period of § 2000e-5(f)(1) is subject to equitable tolling, the thirty-day span allotted under § 2000e-16(c) operates as an absolute jurisdictional limit," citing Bell v. Veterans Administration Hosp., 826 F.2d 357, 360-361 (5th Cir. 1981).

implicate issues of governmental immunity, see Brown v. GSA, 425 U.S. 820, 833 (1976). Accordingly, the terms of the statutory consent to be sued in any court define that court's jurisdiction to entertain the suit, Lehman v. Nakshian, 453 U.S. 156, 160 (1981), and such waivers of sovereign immunity are to be strictly construed. Id. at 161.

For these reasons, the court below correctly concluded that the timely filing requirement in Section 2000e-16(c) is a jurisdictional prerequisite to district court consideration of a Government employee's Title VII complaint. Accord, Sims v. Heckler, 725 F.2d 1143, 1145-1146 (7th Cir. 1984); Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083 (9th Cir. 1983). See also Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989)(where a party suing under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 fails to meet the notice and 60-day delay requirements of 42 U.S.C. 6972(b), the district court must dismiss the action as barred by the terms of the statute). But see Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984)(thirty-day limitation period in 42 U.S.C. 2000e-16(c) is not jurisdictional); Milam v. United States Postal Service, 674 F.2d 860, 862 (11th Cir. 1982)(same); Washington v. Ball, No. 89-8508 (11th Cir. Dec. 13, 1989)(same); Saltz v. Lehman, 672 F.2d 207, 208 (D.C. Cir. 1982)(same).

2. There is, however, no need for this Court to address the apparent conflict in the Circuits on that issue in this case. Cf. Stuckett v. United States Postal Service, 469 U.S. 898 (1984) (White, J., dissenting from denial of certiorari petition, citing conflict in Circuits), because the court below was clearly correct when it decided that petitioner had received constructive notice of the EEOC decision when it was accepted at the office of his designated counsel, and because petitioner has failed to show why his complaint, in any event, could not have been filed within the 30-day limitation period.

As this Court has held, we operate under a "system of representative litigation, in which each party is deemed bound by

the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962), quoting Smith v. Ayer, 101 U.S. (11 Otto.) 320, 326 (1879). This basic policy choice is reflected in Fed. R. Civ. P. 5(b), making service of papers on a party's attorney the normal procedure.

Congress enacted Section 2000e-16(c) against this background. Until there is a clear expression by Congress to the contrary, this longstanding tradition should prevail. See Decker v. Anheuser-Busch, 632 F.2d 1221, 1224 (5th Cir. 1980), vacated and remanded for additional fact finding, 670 F.2d 506 (1982) (en banc).

The circuits that have addressed the issue have almost uniformly concluded that an EEOC right to sue notice delivered to a claimant's attorney constitutes notice to the claimant for purposes of computing the statutory time limit. See, e.g., Josiah-Faeduwor v. Communications Satellite Corp., 785 F.2d 344, 347 (D.C. Cir. 1986); Jones v. Madison Services Corp., 744 F.2d 1309, 1313-1314 (7th Cir. 1984); Harper v. Burgess, 701 F.2d 29, 30 (4th Cir. 1983); Gonzalez v. Stanford Applied Engineering, 597 F.2d 1298, 1299 (9th Cir. 1979). Cf. Craig v. Department of HEW, 581 F.2d 189, 193 (8th Cir. 1978) (interpreting Civil Service Commission regulations as requiring personal acknowledgment by attorney of receipt of notice).[3/] The "bright-line" procedural rule adopted by the court below -- that such notice is effective from the time of its delivery to the attorney's office, regardless of when the attorney actually reads the communication (see Ringgold v. National Maintenance Corp., 796 F.2d at 770; Decker v. Anheuser-Busch, 632 F.2d at 1224), is reasonable and

[3/] As the court of appeals noted (Pet. App. 14-15), when Craig was decided regulatory authority under Title VII rested with the Civil Service Commission, whose regulations stated that the employee could file a civil action "[w]ithin thirty (30) calendar days of his receipt of notice of final [administrative] action". 5 C.F.R. 713.281(a), (c) (1972) (emphasis added). Since then, regulatory authority has been shifted to the EEOC, and the regulation has been modified by dropping the word "his" in front of "receipt." 29 C.F.R. 1613.281(a), (c) (1980).

fully consistent both with Fed. R. Civ. P. 5(b)[4/], and with the purposes of Title VII.

Finally, this is not a case where the petitioner or the petitioner's attorney was unaware of the delivery of the notice of the EEOC decision until after the expiration of the thirty-day filing period. As early as April 10, 1987, petitioner's attorney knew that notice of the EEOC decision had been received in his office on March 23, 1987; although petitioner was apparently not sure when he actually received notice, he believed it was on April 7, 1987. Pet. 3.[5/] Clearly, then, petitioner was on notice that the thirty-day filing period might have started running well before April 7, 1987. He nevertheless opted not to file suit in the district court until May 6, 1987. In this situation, he is hardly in a position to complain of the effects of the failure to file a timely complaint.

[4/] Fed. R. Civ. P. 5(b) provides in relevant part that:

> Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address * * *. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; * * *.

[5/] This uncertainty demonstrates the difficulty with the "actual notice" rule that petitioner advocates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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